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In the Supreme Court of the United States

OCTOBER TERM, 1978

LEWIS W. POE, PETITIONER

v.

CHARLES F. G. KUYK, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioner is no stranger to this Court. For several years petitioner has been litigating questions concerning his medical treatment and discharge by the armed forces. He has filed at least six suits. One ended in a holding that he is not entitled to reinstatement or back pay. *Poe* v. *Stetson*, 562 F. 2d 56 (9th Cir. 1977), cert. denied, 435 U.S. 943 (1978). Another ended in a holding that the United States is not liable under the Tort Claims Act. *Poe* v. *United States*, No. 78-589, cert. denied (Dec. 11, 1978). A third ended in a holding that the physician who ordered petitioner's treatment is absolutely immune from damages liability. *Poe* v. *Mitchell*, No. 78-733, cert. denied (Feb. 21,

1979).[1] This case ended in a holding of improper venue. Other cases are pending (see Pet. App. A4 n.*).

Petitioner's suits have been filed all across the country. This suit for damages was filed in Delaware. Petitioner named the same persons as defendants in an all-but-identical suit filed in Hawaii. Compare Pet. App. A9-A10 with *Poe* v. *Kuyk*, No. 77-1674 (9th Cir. Apr. 12, 1979). The Hawaii and Delaware suits have one more thing in common: none of the defendants lives in the district in which the suit was brought.

Petitioner argues that the question of venue under 28 U.S.C. 1391(e) in suits seeking damages from federal officials should be heard by this Court.[2] We have argued in *Stafford* v. *Briggs*, No. 77-1546, and *Colby* v. *Driver*, No. 78-303, both argued on April 24, 1979, and set for reargument on May 14, 1979, that Section 1391(e) does not apply to actions seeking damages from the pockets of federal officials. There are several reasons, however, why this case does not present that question, and the petition should be denied nothwithstanding the pendency of *Stafford* and *Colby*.

Section 1391(e) allows venue to be laid in any district where "(1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action." Petitioner cannot bring this suit in Delaware under any

[1]One of the respondents in this case is the same physician. See Pet. 1 n.1. Petitioner's attempt to proceed further against Mitchell is barred by res judicata.

[2]Because this suit was dismissed on venue grounds, the substantive issues raised by petitioner are not properly presented.

of these clauses even if Section 1391(e) applies to damages actions. Because none of the defendants resides in Delaware, clause (1) is inapplicable. Because petitioner's claims arose at a medical center in Ohio (see Pet. 4), the cause of action did not arise in Delaware; clause (2) thus is inapplicable. There is no real property involved (so clause (3) is inapplicable), and petitioner resides in Hawaii (so clause (4) is inapplicable).

Petitioner may argue, however, that part of his cause of action arose in Delaware because that was his duty station at the beginning of the events leading to his confinement and treatment in Maryland and Ohio (see Pet. 5). If a cause of action can arise, for purposes of Section 1391(e), in more than one district,[3] then petitioner could invoke clause (2). But even so, there was no need for the Delaware court to adjudicate this claim, because the same claim had been filed in Hawaii. Surely only one district court need proceed to judgment on the same claim against the same defendants.[4] Now that the Ninth Circuit has instructed the Hawaii court to accept jurisdiction (see *Poe* v. *Kuyk*, *supra*, slip op. 3), there is no need whatever for the Delaware court to adjudicate this case. Petitioner has an adequate forum. If this Court ultimately affirms the judgments in *Stafford* and *Colby*, that would

[3]But see 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 3806 at 28-29 (1976) (claim may arise in only one district).

[4]*GTE Sylvania, Inc.* v. *Consumers Union of the United States, Inc.*, cert. granted, No. 78-1248 (May 14, 1979), involves parallel litigation involving a common party and two competing groups of private parties. The competing groups are not both parties to the first-filed suit. Here, by contrast, the parties to the two suits are identical.

vindicate the Ninth Circuit's decision.[5] And if the Court ultimately holds that Section 1391(e) does not supply venue in damages suits, then petitioner could lose nothing by the denial of the petition here. It simply does not affect his rights.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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[5]But not the Ninth Circuit's reasoning. The Ninth Circuit concluded that Section 1391(e) could be invoked if any one of the defendants could be sued in the District of Columbia. It apparently understood this to be the argument made by the United States Attorney; finding that one of the defendants resided in the District of Columbia, and thus could have been sued there, it held that venue must be proper in Hawaii. But this is not the argument the United States made in *Stafford* and *Colby*. We argued, rather, that Congress intended, in adding Section 1391(e) in 1962, simply to provide venue in appropriate districts for mandamus actions that previously could have been brought *only* in the District of Columbia. A damages suit of the sort involved here never was confined to the District of Columbia. Consequently, it is not the sort of suit to which Section 1391(e) applies. But if the Court should hold in *Stafford* and *Colby* that Section 1391(e) applies to damages actions, the fact that one defendant could be found in the District of Columbia would be irrelevant. The suit would be proper in Hawaii no matter where the defendants resided.

[6]There is another reason why this case does not affect petitioner's rights. *Poe* v. *Mitchell*, *supra*, established that the military personnel who arrested and treated him are entitled to immunity. That holding collaterally estops petitioner's attempt to recover from respondents. See *Parklane Hosiery Co.* v. *Shore*, No. 77-1305 (Jan. 9, 1979), slip op. 3-10.